



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

March 30, 2017

Molly C. Dwyer
Clerk of the Court
Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3839

Re: *Animal Legal Defense Fund v. Wasden*, No. 15-35960—Response to
Appellees’ Fed. R. App. R. 28(j) Letter (DktEntry 77)

Dear Ms. Dwyer:

This Court’s decision in *Washington v. Trump*, No. 17-35105, 2017 WL 526497 (9th Cir. Feb. 9, 2017), adds nothing to the previous briefing in this appeal.

First, and foremost, the States’ Equal Protection Clause claim in *Trump* alleged discrimination on the basis of religion—*i.e.*, the Executive Order “was intended to disfavor Muslims.” Slip Op. 25. The panel therefore looked to United States Supreme Court authority dealing with religious and, secondarily, racial discrimination. *Id.* 25-26. As the Supreme Court explained in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.” As it explained further in *Larson v. Valente*, 456 U.S. 228, 248 (1982), the appellants there bore the burden of “demonstrat[ing] that the challenged . . . rule [was] closely fitted to further the interest that it assertedly serves.” These free exercise claim standards are

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wholly foreign to the rational-basis equal protection paradigm applicable here. Br. Appellant 35-36.

Second, *Trump* addressed a claim that the person performing the allegedly discriminatory act—the President—had himself expressed the intent to implement a “Muslim ban.” Slip Op. 25. Here, in contrast, Appellees seek to invalidate through their animus-grounded equal protection theory a statute adopted by a 105-member legislative body, of whom only a few participated in committee hearings or floor debate and most of whom stressed a desire to protect property rights from infringement. Br. Appellant 46-50. Appellees’ attempt to ascribe animus to that entire body runs squarely up against both common sense and federal common law. *E.g.*, *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Devel. Corp.*, 461 U.S. 190, 216 (1983); *see also* Br. Appellant 45.

Third, for the reasons discussed in Appellant’s opening and reply briefs, the plainly rational basis for the challenged statutory provisions negates the need for *any* inquiry into alleged animus and, therefore, the motives of individual legislators. Br. Appellant 43-44; Reply Br. Appellant 22-25.

Sincerely,

/s/ Clay R. Smith

Deputy Attorney General

9th Circuit Case Number(s) 15-35960

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